

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

11 MARK DUFFER, an individual on  
12 behalf of himself and all others  
13 similarly situated,  
14 Plaintiff,  
15 v.  
16 UNITED CONTINENTAL  
17 HOLDINGS, INC., a Delaware  
18 Corporation; UNITED AIRLINES,  
19 INC., a Delaware Corporation;  
20 CONTINENTAL AIRLINES, INC., a  
Delaware Corporation; AIR LINE  
PILOTS ASSOCIATION, INT'L, an  
unknown business entity; THE  
CONTINENTAL AIRLINES  
CHAPTER OF THE AIR LINE  
PILOTS ASSOCIATION, INT'L, an  
unknown business entity, inclusive,  
Defendants.

) Case No. 3:13-cv-0318-GPC-WVG

**ORDER:**

**(1) GRANTING MOTION TO  
TRANSFER VENUE, (ECF NO.  
25);**

**(2) DENYING AS MOOT  
MOTION FOR RELIEF FROM  
CIVIL LOCAL RULE 83.3(c)(5),  
(ECF NO. 35).**

## INTRODUCTION

24 On February 8, 2013, Mark Duffer (“Plaintiff”) filed a class-action complaint on  
25 behalf of himself and other Continental Airlines pilots who are serving or have served  
26 in the United States Armed Services or National Guard. (ECF No. 1.) Plaintiff asserts  
27 three causes of action for (1) violations of the Uniformed Services Employment and  
28 Reemployment Rights Act (“USERRA”); (2) violations of California’s Military and

1 Veterans Code (“MVC”); and (3) negligence. (*Id.*)

2 Before the Court is a motion to transfer venue filed by defendants United  
3 Continental Holdings, Inc. (“UCH”); United Airlines, Inc. (“United”); and Continental  
4 Airlines, Inc. (“Continental”) (all three together, “Airline Defendants”). (ECF No. 25.)  
5 Plaintiff has opposed the Motion to Transfer Venue, (ECF No. 32), and the Airline  
6 Defendants have filed a reply, (ECF No. 38). Defendants Air Line Pilots Association,  
7 Int’l (“ALPA”) and The Continental Chapter of Air Line Pilots Association, Int’l  
8 (“CAL-ALPA”) (both together, “Union Defendants”) have not filed a response to the  
9 Motion to Transfer Venue.

10 Also before the Court is a motion for relief from Civil Local Rule 83.3(c)(5)  
11 filed by ALPA, in which ALPA’s would-be local counsel seeks relief from this Court’s  
12 rule requiring local counsel associated with pro hac vice applicants to be physically  
13 located in or near this judicial district. (ECF No. 35.) The Airline Defendants filed a  
14 notice of non-opposition to the Rule 83.3 Motion. (ECF No. 39.) Plaintiff has not filed  
15 a response to the Rule 83.3 Motion.

16 After a careful consideration of the parties’ submissions, and for the reasons that  
17 follow, the Court hereby **GRANTS** the Airline Defendants’ Motion to Transfer Venue  
18 and **DENIES AS MOOT** ALPA’s Rule 83.3 Motion.

19 **BACKGROUND**

20 Plaintiff, an airline pilot and member of the U.S. Marine Corps Reserve, claims  
21 Defendants have unlawfully withheld payment to Plaintiff and the putative class based  
22 on their military service.

23 UCH was formed in connection with the merger of United and Continental.  
24 Thereafter, UCH negotiated a so-called “United Pilot Agreement” (“UPA”) with  
25 ALPA. The UPA includes Letter of Agreement 24 (“LOA 24”), which provides ALPA  
26 with \$400 million to be distributed to United and Continental pilots. Following  
27 execution of the UPA, an arbitrator decided \$225 million of the \$400 million should  
28 go to United pilots and that \$175 million should go to Continental pilots. CAL-ALPA

1 then formulated a method for distributing the \$175 million to Continental pilots.

2 CAL-ALPA’s distribution formula is based on an “earnings portion” and an  
3 “availability portion.” Under the “availability portion,” the more available a pilot was  
4 during each month of a specific period, the greater the portion of the \$175 million the  
5 pilot would receive. Plaintiff claims that pilots who were absent due to military service  
6 during that specific period were considered unavailable during their absence and will  
7 therefore receive a smaller portion of the \$175 million. Plaintiff alleges that other  
8 types of leave, such as jury duty leave and sick leave, were not counted as periods of  
9 unavailability. Plaintiff therefore claims that ALPA’s distribution formula violates  
10 both the USERRA and the MVA.

## 11 DISCUSSION

12 The Court will first address the Airline Defendants’ Motion to Transfer Venue,  
13 after which the Court will discuss ALPA’s Rule 83.3 Motion.

### 14 **I. Motion to Transfer Venue**

#### 15 **A. Legal Standard**

16 The Airline Defendants’ move to transfer venue pursuant to 28 U.S.C. § 1404(a).  
17 Plaintiff, however, asserts that USERRA’s specific venue provision governs in this  
18 instance, arguing “the Court must give deference to Plaintiff’s chosen forum and need  
19 not consider the factors relevant to a Section 1404(a) transfer analysis.”

20 USERRA does include a venue provision that states in relevant part: “In the case  
21 of an action against a private employer, the action may proceed in the United States  
22 district court for any district in which the private employer of the person maintains a  
23 place of business.” 38 U.S.C. § 4323(c)(2).

24 Few district courts have considered USERRA’s venue provision. In *Johnson v.*  
25 *Dynamics Info. Tech., Inc.*, the court first recognized that, when suing a corporation,  
26 “venue is ordinarily proper wherever the corporation has sufficient contacts to support  
27 personal jurisdiction, ‘except as otherwise provided by law.’” 675 F. Supp. 2d 236,  
28 240-41 (D.N.H. 2009) (*citing* 28 U.S.C. § 1391). The court then read the USERRA

1 venue provision as “*limiting* venue to ‘any district in which the private employer . . .  
2 maintains a place of business.’” *Id.* (emphasis added). That is, the Court concluded  
3 that USERRA’s venue provision is more restrictive than the general venue statute  
4 found at 28 U.S.C. § 1391. Recognizing that specific terms of a statute prevail over  
5 general terms in the same or another statute, the court concluded USERRA’s “exclusive  
6 venue provision” governed the plaintiff’s USERRA claim. *Johnson* 675 F. Supp. 2d  
7 at 240-41.<sup>1</sup> Finding the employer-defendant did not maintain a “place of business” in  
8 the District of New Hampshire, the *Johnson* court concluded venue was not proper for  
9 the plaintiff’s USERRA claim. *Id.* at 241-42.

10 The *Johnson* court went on, however, to conclude venue *was* proper under the  
11 general venue statute for the plaintiff’s breach-of-contract claim. *Id.* at 242. Thus, the  
12 court discussed the possibility of it being a “pendent venue” for the plaintiff’s  
13 USERRA claim.<sup>2</sup> *Id.* Finding the plaintiff’s USERRA claim was his “primary” claim,  
14 however, the court concluded the plaintiff had not “met his burden of showing that  
15 [the] court would be a proper ‘pendent venue’ for his USERRA claim.” *Id.*

16 The *Johnson* court thus decided whether to dismiss the case or transfer it to a  
17 proper venue. *Id.* at 242-43. In deciding to transfer the case, the court was required to  
18 choose between two technically proper venues. *Id.* at 243. Asking the question of  
19 “which forum would be better positioned to further the interest of justice,” the court  
20 considered the following factors: (1) convenience of the parties, (2) convenience of  
21 witnesses, (3) availability of documents, (4) possibility of consolidation, and (5)  
22 judicial economy. *Id.* In other words, the court considered the factors most typically  
23 considered in deciding a motion to transfer venue pursuant to 28 U.S.C. § 1404(a).

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25       <sup>1</sup> See also *House v. Metal Transp. Sys.*, 2010 U.S. Dist. Lexis 24615, at \*14 (“the exclusive  
26 venue provision of 38 U.S.C. § 4323(c)(2) trumps the general venue statute and governs [the  
plaintiff]’s USERRA claim”).

27       <sup>2</sup> “The pendent-venue doctrine gives a court discretion to find venue proper where a pendent  
28 claim arises from the same nucleus of operative facts as a claim with proper federal venue.” *Gamboa*  
*v. USA Cycling, Inc.*, 2013 WL 1700951, at \*4 (C.D. Cal. Apr. 18, 2013); *Sierra Club v. Johnson*, 623  
F. Supp. 2d 31, 37 (D.D.C. 2009).

1     See, e.g., *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.  
2     1986) (listing private and public factors considered when deciding motion to transfer  
3     venue pursuant to 28 U.S.C. § 1404(a)).

4                 Having considered the foregoing cases and statutes, the Court finds the  
5     reasoning set forth in the *Johnson* and *House* cases persuasive as to the USERRA  
6     venue provision being the appropriate standard for determining the venue in which a  
7     USERRA claim *may* be brought. That said, the Court finds no authority for Plaintiff's  
8     proposition that 28 U.S.C. § 1404(a) is inapplicable when deciding whether one venue  
9     is more convenient than another, where both venues are appropriate under the  
10    USERRA venue provision. Thus, because neither party disputes that both this district  
11    and the Northern District of Illinois are appropriate venues, the Court will determine  
12    whether the Northern District of Illinois is a more convenient forum for this action  
13    according to the factors typically considered under 28 U.S.C. § 1404(a).

14                 The § 1404(a) factors are typically divided into public and private  
15    considerations. *Decker Coal Co.*, 805 F.2d at 843. The private factors include the  
16    convenience of the parties and witnesses; the location of relevant evidence; the  
17    availability of compulsory process; and any other practical issues related to ease,  
18    expediency, and cost. *Id.* (*citing Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).  
19    The public factors include relative docket congestion, any local interest in having the  
20    controversy decided at home, and avoiding unnecessary problems with conflicts of  
21    laws or the application of unfamiliar law. *Decker Coal Co.*, 805 F.2d at 843 (*citing*  
22    *Piper Aircraft Co. v. Reyno*, 454 U.S. 241, 241 n.6 (1981)).<sup>3</sup>

23                 The defendant bears the burden of demonstrating that transfer is appropriate. See  
24    *CFTC v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). Indeed, the defendant ordinarily  
25    “must make a strong showing of inconvenience to warrant upsetting the plaintiff's

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28                 <sup>3</sup> *See also Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000) (compiling  
list of factors courts may consider).

1 choice of forum.” *Decker Coal Co.*, 805 F.2d at 843.<sup>4</sup> In class actions, however, the  
2 plaintiff’s choice of venue is often given less weight. *Lou v. Belzberg*, 834 F.2d 730,  
3 739 (9th Cir. 1987). Accordingly, because Plaintiff has filed a class-action suit, his  
4 choice of forum will be given only minimal consideration.

5       **B. Analysis**

6       The Airline Defendants assert this case should be transferred to the Northern  
7 District of Illinois because: (1) the Airline Defendants are headquartered in the  
8 Northern District of Illinois, (2) all of the Airline Defendants’ records regarding the  
9 negotiations that led to the UPA are maintained in the Northern District of Illinois, (3)  
10 all potentially relevant Airline Defendant witnesses reside and/or work in the Northern  
11 District of Illinois, (4) at least half of the potentially relevant ALPA witnesses who  
12 participated in negotiations regarding the UPA reside and/or work in the Northern  
13 District of Illinois, and (5) the Northern District of Illinois is the district in which the  
14 Airline Defendants and ALPA conducted many of their negotiations and other  
15 discussions regarding both the UPA and the lump-sum payouts at issue in this  
16 litigation. Defendants offer the declaration of Jackson Martin, (ECF No. 25-2), which  
17 incorporates by reference Martin’s declaration at ECF No. 12-1.

18       Plaintiff argues the Airline Defendants have ignored these “critical facts”: (1)  
19 Plaintiff is a resident of this district, (2) the Airline Defendants do business in this  
20 district, (3) the Airline Defendants employ Plaintiff in California, (4) Plaintiff is based  
21 in California, (5) ALPA has not objected to venue in this district, and (6) ALPA is not  
22 headquartered in the Northern District of Illinois.<sup>5</sup>

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24       <sup>4</sup> See also *Acceleron, LLC v. Egenera, Inc.*, 634 F. Supp. 2d 758, 765 (E.D. Tex. 2009) (“[T]he  
25 plaintiff’s choice of venue contributes to the defendant’s burden in proving that the transferee venue  
is ‘clearly more convenient’ than the transferor venue.”).

26       <sup>5</sup> Apparently without realizing that Los Angeles is in the Central District of California—and not  
27 this district—Plaintiff further asserts the following facts compel denial of the motion to transfer venue:  
28 (1) the Airline Defendants maintain a large hub and pilot base at Los Angeles International Airport  
(“LAX”), (2) Plaintiff was based at LAX when he filed this suit, (3) Plaintiff’s direct supervisor is  
located at LAX, (4) Plaintiff was a member of his union’s local executive counsel, which represents  
pilots who are based at LAX, and (5) Plaintiff expects to be transferred back to LAX in June 2013.

1 Plaintiff further asserts the Airline Defendants have failed to meet their burden  
2 of demonstrating the Northern District of Illinois would be more convenient because  
3 the Airline Defendants failed to (1) identify a single witness they intend to call at trial,  
4 (2) identify any non-party witnesses who would be unwilling to appear in this district,  
5 (3) offer specific and supported reasons why any witness would be inconvenienced, (4)  
6 consider the fact that documentary evidence can be shared electronically, and (5) offer  
7 evidence that litigating in this district would be financially unfeasible.<sup>6</sup>

8 In reply, the Airline Defendants assert “Plaintiff’s response demonstrates that his  
9 only basis for suing in this District is that it is the district where he resides and is based  
10 (or expects again to be based beginning in June).” The Airline Defendants assert  
11 Plaintiff “concedes that not a single relevant document or, more important, a single  
12 material witness related to his claims can be found in this District and that none of the  
13 allegations in the Complaint arose here.”

14 The Airline Defendants further assert it is unnecessary to provide a list of  
15 witnesses and what they would testify about in this case because, “based on the narrow  
16 scope of claims at issue, it is easy to determine the location of persons involved with  
17 the claims at issue, namely those involved in the negotiation of LOA 24 and the  
18 formulation of ALPA’s implementing allocation methodology.” The Airline  
19 Defendants also assert “it is self-evident that any inconvenience for witnesses  
20 associated with travel to a distant forum is, in part, time that they must take away from  
21 work, regardless of where it occurs.” The Airline Defendants also assert that, “where  
22 material fact witnesses reside primarily outside of the district in which the complaint  
23 is filed, it is presumed that those witnesses are not subject to the compulsory process  
24 of that court.” The Airline Defendants further assert the Northern District of Illinois  
25 has a stronger interest in having this controversy resolved there because the Airline  
26 Defendants are headquartered there, the majority of witnesses with material

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28         <sup>6</sup> In so arguing, Plaintiff objects to Martin’s declaration as lacking foundation. Given the  
thorough foundation laid in Martin’s declaration at ECF No. 12-1, however, the Court overrules  
Plaintiff’s objection and will thus consider Martin’s declaration.

1 information are there, many of the negotiations regarding LOA 24 occurred there, and  
2 discussions over the size of the lump-sum payout (\$400 million) occurred there. The  
3 Airline Defendants finally assert that, while this Court may be more familiar with  
4 Plaintiff's state law claims, Plaintiff's primary claim presents a federal question.

5 Here, the Court concludes this case should be transferred to the Northern District  
6 of Illinois. While the Airline Defendants did not provide a specific list of witnesses  
7 they intend to call at trial, the Court finds many of the witnesses whose testimony  
8 would be relevant to this case are located in the Northern District of Illinois, which is  
9 beyond this Court's subpoena power. Conversely, the Court finds none of the  
10 witnesses whose testimony would be relevant are located in this district. Indeed, it is  
11 unclear whether Plaintiff himself is even located in this district. While Plaintiff states  
12 he "resides" in this district, it appears he works and is based out of Los Angeles, which  
13 is in the Central District of California. Similarly, the Court finds that much of the  
14 documentary evidence in this case is located in the Northern District of Illinois, while  
15 none of the documentary evidence is located in this district. While technology aids in  
16 the sharing of documentary evidence, this factor nonetheless tips in favor of transfer.

17 The public factors similarly tip in favor of transfer. Relative congestion of  
18 dockets is a neutral factor because, as the Airline Defendants' evidence demonstrates,  
19 the time it takes to try a case in this district is comparable to the time it takes in the  
20 Northern District of Illinois. The Court also agrees that the Northern District of Illinois  
21 has a stronger interest in trying this case locally than does this district, as the Airline  
22 Defendants are headquartered there. Further, none of the actions giving rise to  
23 Plaintiff's claims occurred in this district, while many occurred in the Northern District  
24 of Illinois. Lastly, while this Court may be more familiar with application of California  
25 law, the Court agrees that Plaintiff's primary claim is his USERRA claim, which  
26 presents a federal question, and which the Northern District of Illinois is well-equipped  
27 to handle.

28 In sum, based on a consideration of the above factors, the Court concludes the

1 interests of justice warrant transfer of this case to the Northern District of Illinois.

2 **II. Rule 83.3 Motion**

3 Because this case will be transferred to the Northern District of Illinois, ALPA's  
4 Rule 83.3 Motion is moot.

5 **CONCLUSION**

6 After a careful review of the parties' submissions, and for the foregoing reasons,

7 **IT IS HEREBY ORDERED** that:

- 8 1. The Airline Defendants' Motion to Transfer Venue, (ECF No. 25), is  
**GRANTED**;
- 9 2. The Clerk of Court is directed to transfer this case to the Northern District  
of Illinois;
- 10 3. The hearing on the Airline Defendants' Motion to Transfer Venue,  
currently set for May 17, 2013, is **VACATED**; and
- 11 4. ALPA's Rule 83.3 Motion, (ECF No. 35), is **DENIED AS MOOT**.

16 DATED: May 16, 2013

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18 HON. GONZALO P. CURIEL  
United States District Judge

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